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ABSTRACT

The Copyright Act of 1976 provides statutory definitions of fair use and in general is restrictive of the use of film and video in an educational setting, reflecting a general "copyright owner's" point of view. Film distributors are enforcing and planning to continue to enforce their rights under the law. There is a general concern that piracy and unauthorized use may result in pay cable and videocassettes becoming the major forms of distribution at the expense of theatrical film distributors. Twelve references are cited. (Author/CHC)

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FILM/VIDEO EDUCATION AND THE NEW COPYRIGHT ACT

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In its preamble to the new copyright law, the House Committee cited changes in technology as the primary reason for the new law.[1] Yet the law seems to basically neglect what we might call the "old" media, media which predate the archaic Copyright Act of 1909. The law is a much needed, long overdue statute which is noteworthy for several features, including a definition of fair use, a framework for determining what lies within the fair use protection, enhanced protection for the music industry, an attempt at a solution to the cable/copyright problem and guidelines for teachers which have caused rejoice and lament from all parties concerned: teachers, authors, publishers and librarians.[2] Through all this the Act is in the main, silent concerning exemptions, exceptions and uses in regard to the visual moving media.

Numerous conferences were held after the law was signed in October of 1976 and prior to the date of full implementation, January, 1978. The purpose of these conferences and publications, some related to the meetings, some not, was to answer questions, provide guidelines etc., as to the impact of the new law and to make suggestions as to how the various publics involved should act and react. Like the law itself, these conferences and guidelines are most comprehensive and valuable in regards to everything except the visual media. Ironically, many sources bill themselves as the "complete" guide or source.

A brief examination of some illustrates the problem. A good starting point is Writer's and Artist's Rights,[3] by Don Glassman, a remarkably gifted man. The book itself is a historic artifact as it holds the distinction of being the first literary work protected under the new law. Writer's and Artist's Rights is an indispensible

guide for those seeking to obtain and protect copyrights, it is not a guide for the user, nor was it intended to be, although copyright users out number copyright holders by far. The reader can learn the general guidelines of fair use, limitations, exceptions, etc., but will find only the Scantest reference to films and video tapes.

Glassman's work is nevertheless, superior in regards to the visual media when compared to others, including The Complete Guide to the New Copyright,[4] by the New York Law School Review which is mute as to specifics concerning visual media. The New Copyright Law: Questions Teachers and Librarians Ask,[5] by the American Library association and the National Education. Association provides some slight help by explaining the PBS off-air taping policy which allows broad use orginating with PBS and by acknowledging, as does the law itself, that there is a limited right of fair use of the visual media. More important however, is the ALA/NEA discussion of how the evolving business relationships concept effects copyrights; more on this later.

The Copyright Dilemma,[6] ed. Herbert S. White, provides the proceedings of an ALA sponsored conference on copyright and does nothing to solve our dilemma. These exists, less than two years since the full implementation of the New law a multitude of books, guidelines, proceedings and suggestions as to what the law means and how to work with it. Those not involved with the visual media have had their problems in understanding the Act alleviated. Although working with the statute is another matter. For the motion picture and television academic communities and those other communities who can be described as users, no such help exists. However by gleaming many sources, examing the law and making some inferences a framework for understanding, if not working with the law can be reasoned out.

A discussion of fair use is at once an appropriate and inescapable starting point. Prior to the Act of 1976 "fair use" had no statutory recognition or definition. The court created fair use, a system of and nationale for exceptions to the exclusiveness of copyright protection. The judiciary argued that true exclusiveness would hinder, rather than "promote science and the useful arts",[7] the constitutional justification for copyright. The courts would not define the concept, merely saying "this is fair use....", "this is not fair use ....", a permissible or impermissible exception to the control which an author/creator has over his creation. Over the years this case by case system evolved to give considerable latitude for non-commercial use of the print media, this method of ajudication was not sympathetic to the idea of fair use in audio-visual material.

The new law provides a four step framework for determining what is and what is not fair use:

1. The purpose and character of the use
2. The nature of the copyrighted material
3. The amount used and its proportion to the whole
4. The effect of the use on the potential market value.

The law does not provide these guidelines in rank order. Nevertheless some legal scholars feel that fair use will hinge on the type of use and the effect on the market, combinations of 1 and 4. It would be beneficial to film and video scholars if the nature of the material did not weigh heavily in the decision, as historical justification for the fair use of motion pictures and tapes are virtually non-existant.

According to Stephen Freid's thesis, presented in the New York Law Review,[8] there are two types of uses, positive and ordinary (guideline 1) and two types of effect, detrimental and non-detrimental, (guideline 4).

Presumably, education use would be positive. The following types of combinations are possible:

a. detrimental effect - ordinary use
b. no detrimental effect - positive use
c. no detrimental effect - ordinary use
d. detrimental effect - positive use[9]

A judiciary which was guided by this framework would conceivably have no trouble ruling that a use deemed in category A was not fair use, A category B is fair use. The problems arise with category C; how much "ordinary" use can be permitted before the sheer, independent volume becomes detrimental? This problem may seem pale indeed when courts begin a delicate weighing process to decide when a use is positive enough to overcome the consideration of its harmful effect on the market.

Teachers of film and video would no doubt argue that their is a category B usage - positive use, no detrimental effect. But other parts of the law and the current and evolving business relationships make this argument tenuous. The law provides a statutory recognition of the right to show a copyrighted work,[10] but the extent of this right is unclear and in regards to performance rights for someone who owns or rents a copy, the word "public" is specifically designed to over turn MGM Distributors v. Wyatt, 21 C.O. Bull. 203 and make schools places of public performances. Further, the law prohibits the creation of anthologies under the guise of fair use. Visual anthologies would be of inestimable value to the film/video teacher.

The fair use section prohibits the application of the fair use doctrine to materials which are consumable. This obviously includes such things as work books, standardized test etc. Motion pictures and video programs could be deemed consumable since their distribution system and the economic vitality of the industries which produce them, depend upon their being "consumed" during the viewing process, and then gone from

the customer unless in the case of motion pictures, another fee is paid, or in the case of television, a second broadcast is made. For the majority of television broadcasts, the opportunity for a second viewing is not provided. The distribution system for motion pictures and television is based on limited access, scarcity and consumability.

Gerald Mast tries to make an analogy between the problems of the film teacher and the problems which would be encountered by say, the English teacher, if the classroom use of books was regulated in the manner of the classroom use of films.[11] The argument completely falls apart due to the entirely different business factors involved. To the author/publisher success is measured by how many individuals purchase their own copy of the book with all its permenence. Library use, having access to another's property for a fixed period of time, a rough equivalent of theatre going, inhibits individual ownership and is therefore economically undesirable.

The distribution system for film is based upon each individual paying an admission fee to watch a creation appear and vanish forever, unless another fee is paid. It is an experience shared only by those who pay the fee. It is an experience totally controlled by the owner/distributor... This system is essential to gross the tens of millions which are necessary to support the film industry. The screening of films to large numbers who have not paid the fee, is detrimental and permanent access through ownership is not desirable from the copyright holders viewpoint, regardless of how positive the use may be. The contention that film study promotes movie going is untenable given the age of films studied and the fact that the motion picture industry through its own promotion has become one of the major advertisers in the country.

The motion picture industry is today picking up enormous costs to prosecute film and video bootleggers.[12] The tentative steps taken to

alter the distribution system to include the sale of films in cassette format, which legally cannot be publicly displayed, is a response to threats to control as perceived by the industry. Thought is being given to the simultaneous release and sale of feature films with all its implications for theatre owners. The potential threat to the economic well being of theatre owners will not be deterent according to Alan Hirschfield of 20 Century Fox.[13]

There are, though positive points to consider. The new law does acknowledge that some right of fair use does exist for motion pictures and video. So far this right has been defined to permit off-air taping of programs for personal use in the home. This was part of the decision in Universal City Studios v. Sony.[14] Universal and others had sought to prohibit the manufacture and sale of home video taping equipment, arguing that Sony and others were illegally interferring with their business. The court ruled that Sony is not responsible for how its equipment is used and that off-air taping of non-pay TV programs for personal in home use was permissable.

While the outcome of this case was predictable, it is still significant. If there exists no personal right of fair use in the home, what chance would there be for any other type of fair use? In affirming what was perhaps the obvious, the court relied in part upon the business distribution relationship.[15] The objective of the networks and stations is to distribute their product to as many people as possible and for "free". The court determined that home taping promotes this goal by negating the audience loss brought about by abscence, counter programming and other activities. This decision may be a double edged sword. If copying and fair use is to be submitted to the test of supporting the owners distribution system,

the specific prohibition on taping pay-TV, which is of course primarily movies, indicates that usage of motion pictures would never be passed as "fair". The judge concludes that this is pre-emminently a problem for congress.[16]

Frequently the complaint is heard that the new law doesn't deal with the visual media, or that it neglects it, or that the area isn't handled adequately. This line of reasoning is not supportable. What the law does not do is treat motion pictures and video in a detailed manner comparable to the treatment accorded to the print media and music. If this is to be deemed "neglect" or an "oversight", it is neglect and oversight reflective of the inaction and/or incapacity of the users of motion pictures and video in the non-commercial sector. Various parts of the law are heavily reflective of the input of various interest groups. The influence of the Motion Picture Association of America, the American Library Association, the broadcast industry, CATV, ASCAP, BMI and others was much in evidence during the law making process and now is much in evidence in the law itself.

The academic film and video community did not make its pressence felt in a similar manner. A film producer/distributor would not feel "neglected" by the law. The general silence of the new law regarding exemptions and exceptions to film and video exclusivity says much about the inability of non commercial film and video users to speak effectively during the legislative process. At this point in time the law is very restrictive and permits little more than personal in home taping and provides regulated library use of news broadcasts. The Act reflects very well the restrictive distribution system of the film industry.

The Copyright Law per se is not the problem directly faced by film teachers and is not the real target of Mast's analysis and criticism in the Quarterly Review of Film Studies. The real problem is a combination of the following factors. 1. the cost of prints, 2. the film distribution system, 3. the nature of contracts, to which we add, 4. the impact of the law through its definition of "public performance" and the "bundle of rights" concept. Films are costly and heavy use promotes the extinction of a given print at a rapid rate. This discourages the purchase of films, though in the long run this makes economic sense compared to the accumulation of rental fees. Since educational institutions seem disinclined to purchase, the film educator runs into the distribution system which is based on limited access, limited screening and rental not ownership. When the copyright holder or distributor contracts for the use of a film, he/she is free to negotiate away from statutory "bundle of rights" which comes with each copyright, as deemed appropriately.

What scholars and others are critical of is the inability to obtain more favorable terms. But before we criticize the film industry, some soul searching is necessary. How much of our creative products are we willing to give away? Essentially we do that in regards to journal articles. But what about a book, play, a tape, or a movie? Would we be willing to give away something into which we had poured our time, creative energy and money, when commercial gain was possible? Mast complains about the problems he faced in obtaining visuals for his very successful A Short History of the Movies, how much of this work is he willing to give away?

The new law reflects very effectively the interests of the holders of copyrights on films and tapes, To date it offers the user

little. There are at least two options opened to the educator, one very costly and offering slight chance of success, the other requiring time, effort and organization, but with some promise of reward. The costly and the no doubt futile option, would be court battles to determine how much fair use there is for film and video, or court battles to have specific uses ruled non detrimental or so positive as to overcome considerations of market impact. Users simply cannot fight these battles. To see the nature of the oppositon one needs only to examine the combantants currently struggling over the CATV compulsory license fees at the Royalty Tribunal Office. Their combined legal fees may well exceed the available pot. But what these groups, MPAA, networks etc. are fighting for is a distribution system which once in place will provide increasing rewards as the fee rate and fund inevitably increase. Some of these same groups are spending millions to prosecute video pirates. It would be inadvisable to engage such forces in a legal struggle.

The more feasible alternative is to negotiate collectively, as others have done, to obtain more favorable terms on rentals. To purchase films or video cassettes is of questionable value as long as the law defines public performance as it now does. These negotiations could serve to formalize, one is tempted to say legalize the current SOP on many campuses. Publishers are now collectively sueing photo copying firms, the possibility of more effective policing of rental contracts cannot be dismissed. An attempt could be made to amend the law to make school uses non-public performances, but such an effort would run the currently disorganized users straight up against the formidable, well organized and well financed copyright holders. Even if Congress would amend the Act and they have showed no

inclination to, users would still face the problems of the economics of ownership.

In any event, film and video educators/users are in a very unfavorable position due to their lack of effective organization. Those who were organized fared well under the new law, relatively speaking. If film and video users expected to be carried by the impetus of the library establishment, they were sadly mistaken. Despite the talk of new technologies and loose usage of the term "communication revolution", the law, publications and the proceedings of conferences clearly reflected the fact that librarians essentially remain book bound.

Currently, the most that can even be hoped for is business as usual, and business as usual got us where we are today.

FOOTNOTES

1 _____, The New Copyright Law, Questions Teachers and Librarians Ask, NEA, 1977, p.10.

2 Jerry D. Chaney, "New Copyright Law Gives Authors Little Cause for Rejoicing", Journalism Quarterly, Autumn, 1978, p.516.

3 Don Glassman, Writer's and Artists Rights, Writer's Press, Washington, D.C. 1978.

4 _____, The Complete Guide to the New Copyright Law, New York Law Review, 1977.

5 See note #1

6 Herbert S. White, ed., The Copyright Dilemma, American Library Association, Chicago, 1978.

7 United States Constitution, Article I, Section 8, para. 8.

8 Stephen Freid, "Fair Use and the New Act", in The Complete Guide to the New Copyright Law, New York Law School Review, N.Y., 1977.

9 Ibid., p. 187.

10 _____, Copyright Review Act of 1976, Commerce clearing House Inc., Chicago, 1976, p. 148.

11 Gerald Mast, "Film Study and the Copyright Law", Quarterly Review of Film Studies, Summer, 1979, pp. 275-297.

12 Neil Hickey, "Knock Three Times and ASIC for Bambi", T.V. Guide 6/21/80, p. 4.

13 Hickey, p. 6.

14 Universal City Studios v. Song, 5 Med. L. Rptr, 1737.

15 5 Med. L. Rptr at 1755.

16 5 Med. L. Rptr at 1767.

17 Glassman, p. 64.

18 Broadcasting, August 4, 1980, p. 28.